86-833 (1)

No.

Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT A. DESCHAMBAULT AND
SIDNEY JAY HARRISON, PETITIONERS

v.

JAMES SOWELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CHARLES FRIED
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21pp

QUESTION PRESENTED

Whether the immunity recognized in *Barr* v. *Matteo*, 360 U.S. 564 (1959), protects petitioners – federal employees sued in their individual capacities – from liability under state tort law for injuries allegedly caused by their official acts.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the American Cyanamid Company, K. Chavis General Contractor, Inc., J. B. Converse & Co., Inc., and Seaboard Surety Co., are defendants in the district court. These parties did not appear in the court of appeals, however, and therefore are not respondents in this Court (see Sup. Ct. R. 21.1(b)).

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In the Supreme Court of the United States

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Solicitor General, on behalf of Robert A. Deschambault and Sidney Jay Harrison, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App., *infra,* 1a) is reported at 791 F.2d 170 (Table). The orders of the district court (App., *infra,* 2a-5a, 6a-8a) are unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra,* 1a) was entered on May 1, 1986. A petition for rehearing was denied on June 25, 1986 (App., *infra,* 9a-10a). On September 16, 1986, Justice Powell issued an order extending the time for filing a petition for a writ of certiorari to and including October 23, 1986; on October 15, 1986, Justice Powell issued an order further extending the time within which to file a petition to and including November 21, 1986. The jurisdiction of this Court rests upon 18 U.S.C. 1254(1).

STATEMENT

1. This is a state law tort action in which respondent seeks monetary damages from petitioners, both of whom are federal employees, for injuries allegedly caused by conduct that was within the scope of petitioners' official duties. Petitioner Sidney Harrison is a safety specialist at the Naval Air Station in Pensacola, Florida, responsible for implementing Occupational Safety and Health Act standards. Petitioner Robert Deschambault is a fire protection inspector at the Naval Air Station responsible for, among other things, issuing welding and burning permits. Harrison Affidavit, dated November 19, 1984; Deschambault Affidavit, dated November 19, 1984. Respondent is a civilian employee of the federal government assigned to the Public Works Department at the Naval Air Station (Amended Complaint at 2).

On October 27, 1983, respondent was directed to weld a tank at the Naval Air Station's waste treatment plant. He requested a hazardous operation permit from his foreman, who forwarded the request to petitioners (Amended Complaint at 2); petitioners subsequently issued the permit (Harrison Affidavit at 1; Deschambault Affidavit at 1). Respondent began to weld the tank, which had contained sulphuric acid; the tank ruptured and, as a result, respondent incurred various injuries (Harrison Affidavit at 1-2; Deschambault Affidavit at 1-2; see also Amended Complaint at 2-3).

Respondent subsequently commenced this action against petitioners in Florida state court. He alleged that petitioners "had a duty to provide [him] with a safe work environment, to protect him and warn him of hazards," and that petitioners acted negligently by "issuing a burn permit, attesting to the safety of the work areas, when in fact [they] * * * knew or should have known of the explosive nature of the work environment" (Amended Complaint at 2-3). Respondent does not seek a specific amount

of damages, but states that "[t]his is an action for damages in excess of Ten Thousand ($10,000.00) Dollars" (*id.* at 1).[1]

Petitioners removed the action to the United States District Court for the Northern District of Florida pursuant to 28 U.S.C. 1442(a)(1); they filed a motion to dismiss or, in the alternative, for summary judgment on the ground that they were absolutely immune from suit under *Barr* v. *Matteo*, 360 U.S. 564 (1959). An affidavit supporting the motion filed by the executive officer of the Public Works Center at the Naval Air Station stated that petitioners' actions in connection with the accident were "in the scope of their employment as employees of the Department of the Navy and the United States Government" (Vadas Affidavit, dated Oct. 26, 1984). The officer further stated that respondent "applied for and received benefits for his resultant injuries under the Federal Employees' Compensation Act" (*ibid.*).

The district court denied the motion (App., *infra*, 2a-5a). It concluded that a federal employee is entitled to immunity from common law tort liability only if "[t]he employee's act [is both] * * * within the scope of his federal employment" and " 'discretionary' " (*id.* at 4a). The court stated that petitioners had not shown that they exercised a degree of discretion sufficient to entitle them to immunity (*id.* at 4a-5a).

Petitioners filed a motion for reconsideration; the district court treated that motion as a renewed motion for summary judgment and denied the motion (App., *infra*,

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[1] The complaint also names as a defendant the American Cyanamid Company, alleging that the company negligently manufactured the product that caused the explosion and that it was strictly liable for the damage caused by that product (Amended Complaint at 3-5). In his amended complaint, respondent joined as defendants the companies that manufactured the tank and the surety of one of those companies (*id.* at 5-11).

6a-8a). It observed that "additional facts have been developed which establish that the discretion exercised by [petitioners] was 'operational,' and not within the realm of 'absolute immunity' * * *. [Petitioners] were not engaged in planning or policy-making. [Petitioners] merely were exercising the type of discretion that most employees are required to use in the fulfillment of day-to-day operations. It would be a major expansion of the official immunity doctrine to apply it to the facts of this case" (*id.* at 6a-7a (citations omitted)). The court acknowledged that "there is an incongruity in a theory that protects only the highest level of government employees while leaving the rank and file exposed to tort liability," but concluded "that is the present state of the law" (*id.* at 8a). The court therefore denied petitioners' motion for summary judgement.

The court of appeals affirmed without opinion (App., *infra,* 1a). The court cited its Rule 25, which provides in pertinent part that a decision may be affirmed without opinion where "no error of law appears and an opinion would have no precedential value." Several weeks earlier, another panel of the court of appeals stated that the Eleventh Circuit had adopted "the rule that 'a government employee enjoys immunity only if the challenged conduct is a discretionary act *and* is within the outer perimeter of the actor's line of duty.' " *Erwin* v. *Westfall,* 785 F.2d 1551, 1552 (1986) (emphasis in original; citation omitted), petition for cert. pending, No. 86-714. Another panel of the Eleventh Circuit subsequently stated that " 'discretionary acts' involve planning or policy considerations and do not concern day to day operations" (*Heathcoat* v. *Potts,* 790 F.2d 1540, 1542 (1986) (citation omitted)).

REASONS FOR GRANTING THE PETITION

The question presented in this case is the same as the question presented in *Westfall* v. *Erwin*, petition for cert. pending, No. 86-714, *i.e.*, whether a federal employee is subject to personal liability under state tort law for his official acts.[2] The district court in the present case concluded that petitioners were not entitled to immunity from tort liability because they "were not engaged in planning or policy-making" (App., *infra*, 7a), the precise rule applied by the court of appeals in *Westfall*. As we argued in our petition in *Westfall* (at 9-18), this narrow application of immunity doctrine is inconsistent with the reasoning in *Barr* v. *Matteo*, 360 U.S. 564 (1959). We submit that a federal employee is entitled to immunity from liability under state tort law as long as he acts within the scope of his official duties.[3]

In addition, petitioners here, like the petitioners in *Westfall* (see 86-714 Pet. 18-20), would be immune from tort liability even if this Court were to determine that immunity is limited to federal employees who exercise discretion. Petitioners' safety duties plainly require them to make a variety of sensitive judgments in order to evaluate the effect of proposed actions upon the safety of the workplace. Even if the exercise of discretion is a necessary prerequisite to a federal employee's absolute immunity from common law torts, therefore, petitioners should be afforded immunity so that their exercise of discretion will not be affected by the fear of potential personal liability.

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[2] We have served counsel for respondent with a copy of the petition in *Westfall*.

[3] Since petitioners and respondent all are federal employees, and respondent's claim relates to their common workplace, immunity would be appropriate here if the Court adopts an immunity rule that applies to common law tort actions brought by one federal employee against a fellow employee (see 86-714 Pet. 18 n.17).

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in view of the disposition of the petition in *Westfall* v. *Erwin,* No. 86-714.

Respectfully submitted.

CHARLES FRIED
Solicitor General

NOVEMBER 1986

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85-3743

JAMES SOWELL, PLAINTIFF-APPELLEE,

v.

AMERICAN CYANAMID COMPANY, ETC., ET AL., DEFENDANTS,

ROBERT A. DESCHAMBAULT AND SIDNEY JAY HARRISON, DEFENDANTS-APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(May 1, 1986)

Before FAY, Circuit Judge, HENDERSON* and NICHOLS**, Senior Circuit Judges.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

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* See Rule 3(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Philip Nichols, Jr., Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

No. PCA 84-4463-RV

JAMES SOWELL, PLAINTIFF,

v.

AMERICAN CYANAMID COMPANY,
A MAINE CORPORATION, ET AL., DEFENDANTS.

[Filed February 7, 1985]

ORDER

Defendants, Robert A. Deschambault and Sidney Jay Harrison, have filed a motion to dismiss or, in the alternative, a motion for summary judgment, pursuant to Rule 12 and Rule 56, Federal Rules of Civil Procedure (doc. 9). Defendants Deschambault and Harrison also have filed affidavits in support of their motion with their job descriptions attached (docs. 11, 12).

Defendants assert an absolute immunity against common law torts as long as their alleged wrongful acts are within "the outer perimeter of their federal employment." *Barr v. Matteo*, 360 U.S. 564, 575, 3 L.Ed. 2d 1434, 1443 (1959). Defendants maintain that their affidavits demonstrate that they were working within their federal job descriptions and therefore furthering the government's business.

To determine whether the official immunity doctrine of *Barr* applies to the present defendants, it is necessary to examine the factors affecting application of this doctrine,

which is largely of judicial making. [*Barr, supra.*, 360 U.S. at 569, 3 L.Ed 2d at 1440.][1]

The U.S. Supreme Court has clarified the doctrine in *Doe v. McMillan*, 412 U.S. 306, 319-20, 26 L.Ed. 2d 912, 924-25 (1973):

> [The doctrine] confers immunity on government officials of suitable rank for the reason that "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." The official-immunity doctrine seeks to reconcile two important considerations—
>
> > [O]n the one hand, the protection of the individual citizen against precuniary [*sic*] damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest shielding responsible governmental officers against the harrassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities.
>
> In the Barr case, the Court reaffirmed existing immunity law but made it clear that the immunity conferred might not be the same for all officials for all purposes.

(Citations omitted)

Defendants' job descriptions do not show that they are governmental officials engaged in "the fearless, vigorous

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[1] *Barr v. Matteo, supra.*, has been limited to tort immunity by *Butz v. Economou*, 438 U.S. 478, 57 L.Ed. 2d 895, 98 S.Ct. 2894 (1978). Defendants here do not raise the issue of qualified immunity and the

and effective administration of policies of government" for which the absolute immunity applies. The employee's act must be not only within the scope of his federal employment, but also must be "discretionary:"

> Federal officials enjoy absolute immunity from common law tort liability for actions within the scope of their authority.
>
> * * *
>
> All that is necessary is that " 'the action of the federal official bear some reasonable relation to and connection with his duties and responsibilities . . .,' " and that the action of the official is connected with a "discretionary function."
>
> *Williams v. Collins*, 728 F.2d 721, 727 (5th Cir. 1984).

This "discretionary function" is not of the type practically any employee must exercise in the fulfillment of his job requirements, but instead relates back to the reasons for the immunity in the first instance:

> The "discretionary function" requirement is determined according to whether "the act complained of [is] the result of a judgment or decision which it is necessary that the Government official be free to invoke without fear or threat of vexatious or fictitious suits and alleged personal liability."
>
> *Spencer v. New Orleans Levee Board*, 737 F.2d 435, 437 (5th Cir. 1984).

In the cases that defendants rely upon, government officials established [or it was apparent] that they had exercised a discretionary function which afforded them ab-

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good faith defense of *Scheuer v. Rhodes*, 416 U.S. 232, 40 L.Ed. 2d 90, 94 S.Ct. 1683 (1974) and *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed. 2d 396, 102 S.Ct. 2727 (1982).

solute immunity. *See, e.g., Bush v. Lucas*, 647 F.2d 573 (5th Cir. 1981); *Evans v. Wright*, 582 F.2d 20 (5th Cir. 1978); *Vest v. Waring*, 565 F.Supp. 674 (N.D.Ga. 1983); *Bechtel v. U.S. Office of Personnel Management*, 549 F.Supp. 111 (N.D.Ga. 1982). This has not been established as a factual matter in this case.

For the foregoing reasons, defendants have failed to show that they have absolute immunity. Defendants' motion to dismiss or for summary judgment is hereby DENIED.

DONE AND ORDERED this 6th day of February, 1985.

/s/ ROGER VINSON
Roger Vinson
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

No. PCA 84-4463-RV

JAMES SOWELL, PLAINTIFF,

v.

AMERICAN CYANAMID COMPANY, ET AL., DEFENDANTS.

[Filed September 5, 1985]

ORDER DENYING MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS DESCHAMBAULT AND HARRISON

By this Court's order and notice of July 31, 1985, the parties were advised that the motion to reconsider filed on behalf of defendants Robert A. Deschambault and Sidney Jay Harrison would be treated as a renewed motion for summary judgment, and set for hearing on August 23, 1985. Upon consideration of the memoranda and evidentiary matters filed herein in support of, and in opposition to, the defendants' motion, and having heard argument of counsel, the motion is hereby DENIED.

The reasons for the denial are partially set forth in this Court's order of February 7, 1985. Further, additional facts have been developed which establish that the discretion exercised by these two defendants was "operational," and not within the realm of "absolute immunity" recognized by *Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1957); *Barr v. Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed. 2d 1434 (1959), and *Doe v. McMillan*, 412 U.S. 306, 93 S.Ct. 18, 36 L.Ed. 2d 912

(1973). The defendants were not engaged in planning or policy-making. The defendants merely were exercising the type of discretion that most employees are required to use in the fulfillment of day-to-day operations. It would be a major expansion of the official immunity doctrine to apply it to the facts of this case.

Significantly, defendants have relied upon *Johns v. Pettibone Corp.*, 755 F.2d 1484 (11th Cir. 1985), in support of their claim of absolute tort immunity for discretionary actions exercised in an industrial accident setting. The *Johns* case is binding upon this Court, and the Eleventh Circuit's March opinion supports a very broad application of the absolute immunity to federal employees. Yet, it is clearly an anomaly among the reported cases in the area. Now, however, the Eleventh Circuit has withdrawn its March opinion. *Johns v. Pettibone Corp.*, ____ F.2d ____ (11th Cir. No. 84-7361, decided August 26, 1985). The other cases relied upon by these two defendants are readily distinguishable. The defendants were not acting for regulatory agencies, as was the situation in *United States v. Varig Airlines*, 467 U.S. ____, 104 S.Ct. 2755, 81 L.Ed. 2d 660 (1984). Nor was there an exercise of general investigatory authority, as in *Williams v. Collins*, 728 F.2d 721 (5th Cir. 1984) and *Sanders v. Nunley*, No. C-85-1887 (N.D. Ga., June 25, 1985). The immunity of federal prosecutors stating what is within the controlling regulation is well recognized, but that is not the issue here. *Stepanian v. Addis*, 699 F.2d 1046 (11th Cir. 1983). The key inquiry is whether "it involves enforcement or administration of a mandatory duty at the operational level, even if professional expert evaluation is required." *Jackson v. Kelly*, 557 F.2d 735, 737-38 (10th Cir. 1977). If it does, then it is *not* "discretionary" within the meaning and application of the discretionary functions test for official immunity.

The Federal Tort Claims Act specifically excludes actions "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of . . . an employee of the Government." [28 U.S.C. § 2680(a)] The Fifth Circuit has construed this part of the statute as inapplicable to tort actions such as this case:

> The discretionary function envisioned by 28 U.S.C. § 2680(a) and by *Dalehite* was the government's policy decision to construct an aircraft maintenance facility at Fort Rucker and to build a drainage system in furtherance of that goal. Once the government decided to build a drainage ditch, it was no longer exercising a discretionary policy-making function and it was required to perform the operational function of building the drainage ditch in a non-negligent manner.
>
> *Seaboard Coastline R.R. Co. v. United States*, 473 F.2d 714, 716 (5th Cir. 1973).

Although I agree that there is an incongruity in a theory that protects only the highest level of government employees while leaving the rank and file exposed to tort liability, that is the present state of the law. I am obligated to follow it.

Under the circumstances, therefore, I find no basis upon which to grant defendant's motion for summary judgment under Rule 56, Federal Rules of Civil Procedure.

DONE AND ORDERED this 5th day of September, 1985.

/s/ ROGER VINSON
Roger Vinson
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-3743

JAMES SOWELL, PLAINTIFF-APPELLEE,

v.

AMERICAN CYANAMID COMPANY, ETC., ET AL.,
DEFENDANTS,

AND

ROBERT A. DESCHAMBAULT AND SIDNEY JAY HARRISON,
DEFENDANTS-APPELLANTS.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA**

(June 25, 1986)

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC (Opinion _____, 11 Cir., 198__, ____ F.2d ____).

Before FAY, Circuit Judge, HENDERSON and NICHOLS, Senior Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ PETER T. FAY
United States Circuit Judge

U.S. GOVERNMENT PRINTING OFFICE: 1986 - 181 483/40081